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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners*

vs.

CITY OF FORT WORTH ET AL., *Respondents*

Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, in Opposition to Petition for Writ of Certiorari

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JURISDICTION

No substantial federal question compelling review is presented in this case, and therefore no jurisdiction exists to review the well-considered decision of the United States Court of Appeals for the Fifth Circuit.

This is not a case involving any violation of the Equal Protection Clause of the Fourteenth Amendment, but is plainly and simply a classic example of a res judicata case, under the admitted facts of which these same Petitioners had instituted the same declaratory judgment suit against the same Respondents in a State Court before filing this suit in the Federal Court.

After the State Court had held the hearing on June 12, 1970, on Petitioners', as well as Respon-

dents', Motions for Summary Judgment and thereafter informally indicated on August 25, 1970, that it would grant Respondents' Motion, Petitioners proceeded to turn their backs on the State Court system which declined to rule in their favor and on August 31, 1970, instituted this suit in the United States District Court for the Northern District of Texas, which suit, for all practical purposes, was a carbon copy of their suit still in the process of adjudication in the State Court.

Judgment adverse to Petitioners on the same identical issues was thereafter rendered in the State Court on September 2, 1970. Petitioners gave notice of appeal from such adverse judgment to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth but later abandoned their State Court appeal after filing this suit in the Federal Court.

Even a cursory examination of the record reveals that the Petitioners' legal claims in the Federal Court were identical to their claims pending in the State Court case and that Petitioners were attempting to relitigate the same claims and issues on the merits in the Federal Court that they had unsuccessfully presented in their State Court case. The decision of the Court of Appeals for the Fifth Circuit affirming the judgments of the Three-Judge Court and the District Court dismissing the complaint for want of jurisdiction without passing on the merits was in all things proper and consistent with the national policy forbidding federal courts to stay, enjoin or interfere with

state court proceedings which afford petitioners every opportunity to raise and dispose of their constitutional claims. It is obvious that if jurisdiction was assumed by the Three-Judge Court, such assumption of jurisdiction would have violated such policy and had the effect of enjoining the trial and appellate proceedings in the State Court. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Further, the assumption of jurisdiction by this Court would merely constitute an extension of the judicial power to determine abstract questions. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

The uncontroverted record clearly and positively demonstrates that the appealable State Court judgment was res judicata of Petitioners' Federal Court case. *Brown v. Chastain*, 416 F.2d 1012 (5th Cir., 1969), cert. den., 397 U.S. 951; *Paul v. Dade County, Florida*, 419 F.2d 10 (5th Cir., 1969), cert. den., 397 U.S. 1065.

QUESTIONS PRESENTED

None of the abstract questions presented for review by Petitioners have any bearing on the material facts of record in this case.

The predicate for the order of the Three-Judge Court dissolving itself for lack of jurisdiction was properly raised and carried forward by these Respondents in their Motion to Dismiss and in Opposition to the Appointment of a Three-Judge Court filed herein on September 3, 1970 (R., pp. 6-10), as well as in their Motion for Judgment on the Pleadings Dismissing the Complaint and Original Answer (R., pp. 16-123). By Memorandum Order signed September 3, 1970, the Resident Judge referred thereto as follows:

> "6. The defendants, City of Fort Worth, Bateman and Stovall, have filed a motion to dismiss and in opposition to the appointment of a three-judge court. Action on that motion will be held in abeyance until it is determined whether a three-judge court should be convened and, if so, whether such court should pass on the motion." (R., pp. 12-13)

The fact of res judicata was conclusively demonstrated by Respondents' exhibits marked Defendant City Exhibit "A" through Defendant City Exhibit "H", inclusive, referred to in Paragraph 4 (R., pp. 17-20) of the Motion for Judgment on the Pleadings Dismissing the Complaint and Original Answer and contained in the Record (Appendix) at pages 37-88. Such exhibits include Petitioners' pleadings and af-

fidavits and motion for summary judgment filed in the District Court of Tarrant County, Texas, 141st Judicial District, in Cause No. 57283-C, as well as the pleadings, answers and motions therein of these Respondents.

There is abundant support in the record for the dissolution of the Three-Judge Court remanding the case to the District Court Judge and the order of dismissal of Judge Brewster and the subsequent affirmance of such judgments dismissing the complaint by the Court of Appeals.

Petitioners' Motion for Summary Judgment in the State Court case, which motion was overruled by Judgment rendered and signed September 2, 1970, alleged in part:

> "That there is no genuine issue as to any material fact and that plaintiffs are as a matter of law entitled to judgment herein **for the reason that the state constitutional and statutory provisions complained of by plaintiffs are in conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment** to the Constitution of the United States of America." (Emphasis supplied) (R., p. 46)

Judgment of the State Court rendered and signed on the 2nd day of September, 1970, found that the Respondent City of Fort Worth was "entitled to judgment as a matter of law and that the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong,

should be and the same is hereby overruled." (R., p. 88)

Notice of appeal by these same Petitioners was also recited in said Judgment as follows:

> "To all of which action on the part of the Court the plaintiffs then and there, in open court, duly excepted and objected and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.
>
> "RENDERED AND SIGNED this the 2nd day of September, 1970." (R., p. 88)

Petitioners would attempt to mislead this Court into concluding that the State Court Judge's letter of August 25, 1970, is, in fact, a judgment. Under Rules 306a and 329b of the Texas Rules of Civil Procedure, a judgment cannot be rendered by letter from a judge and a judgment must be pronounced in open court and reduced to writing in proper form and manner for filing in the Minutes of the Court. *Canales v. Salinas*, 288 S.W.2d 207 (Tex.Civ.App., 1956, err. dism.); *Ex parte Godeke*, 355 S.W.2d 701 (Tex., 1962). The judgment rendered and signed on September 2, 1970, by the State Court Judge overruling Petitioners' State Court motion for summary judgment, and from which these same Petitioners gave notice of appeal, is the formal appealable order, judgment and decree which became final under Rule 329b of the Texas Rules of Civil Procedure on October 2, 1970.[1]

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[1]See Appendix "A" hereto, *post*, p. 28, for copy of State Court Judgment.

Thus on the factual record in this case, the only question presented for review can be the following:

> Was the decision of the Court of Appeals correct in holding that:
>
> "Our prior decisions in *Brown v. Chastain, supra,* and *Paul v. Dade County, supra,* are plainly controlling here, as decided by the courts below. **The parties were the same, the issues were the same. The plaintiffs lost what they allowed to become a final judgment in the state court and started over again in the federal courts."?** (Emphasis supplied)

STATEMENT OF THE CASE

The statement of the case contained in the Petition is neither complete nor correct. In lieu thereof and for the convenience of the Court, these Respondents would set out in chronological sequence the material facts:

On June 25, 1969, Petitioner Kathleen Carter brought a suit designated as Cause No. 57283-C in the 141st Judicial District Court of Tarrant County, Texas, against the Fort Worth Independent School District, and thereafter, on April 28, 1970, Plaintiffs' First Amended Original Petition was filed, adding the remaining Petitioners as parties plaintiff, bringing the suit as a class action, joining the City of Fort Worth as a party defendant, and praying, among other things, "that citation issue to the defendants, a copy to be served on the Attorney General of Texas ***."

In Paragraph 7 of Plaintiffs' First Amended Orig-

inal Petition filed in the State District Court (Defendant City Exhibit "A", R., p. 40), the same plaintiffs who are petitioners herein alleged as follows:

"7.

"That since the filing of this suit, defendant City of Fort Worth by and through its duly elected officials have publicly announced that a bond election shall be called within the calendar year 1970 to obtain funds for financing the following governmental projects (the amount of the proposed bonds follows the proposed governmental project):

Street Improvements	$23,000,000.00
Fire Protection	750,000.00
Park and Recreation Improvements	3,000,000.00
Aviation Improvements at Municipal Airport	2,000,000.00
Library Improvements	7,900,000.00

That in addition to these general obligation bonds an additional $9,500,000.00 is proposed to be issued as general obligation bonds but to be paid from revenues received from the sale of water and sewage services to the residents of the City of Fort Worth and adjoining communities.

"That plaintiffs are in imminent danger of being denied the right to vote in elections involving the issuance of bonds, lending of credit, expending of money, or assuming any debt because of the provisions of Article 6, sections 3 and 3(a) of the Texas Constitution, and because of the provisions of Articles 5.03 and 5.07 of the Texas Election Code. That plaintiffs' right to vote in the pending city elections and in future elections

involving the issuance of bonds, lending of credit, expending of money, or assuming any debt is in serious jeopardy on account of these four provisions, and their application by defendants. Plaintiffs say that excluding them from participation in these elections denies them equal protection of the law and that their exclusion is not necessary to promote a compelling state interest; that in fact there is no reasonable basis at all for the existence of the limitation or restriction of suffrage imposed by the state constitution and statutes referred to herein."

In Paragraph 8 of Plaintiffs' First Amended Original Petition (R., pp. 40-41), these same Petitioners alleged in the State Court suit in part as follows:

"8.

"That Article 6, sections 3 and 3(a) of the Texas Constitution and Articles 5.03 and 5.07 of the Texas Election Code tend to prevent or chill the free exercise by plaintiffs and their class of the right to vote freely in elections involving the issuance of bonds, lending of credit, expending of money, or assuming any debt.

* * *

"That the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not allow wealth of any kind or degree to be a condition requisite to the right to vote. That the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not permit the requirement of rendition for taxation of wealth in any form as a condition to the right to vote. That the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United

States does not permit the requirement of proof of wealth of any kind or degree to be a condition to the right to vote."

In the prayer in the State Court (R., pp. 41-42), Petitioners herein prayed for relief as follows:

"***that citation issue to the defendants, **a copy to be served on the Attorney General of Texas**; and **upon final hearing that the Court** construe the above statutes and constitutional provisions, and **declare that** insofar as such statutes and constitutional provisions make ownership of property in any form a requirement for the right to vote, that **such statutes and constitutional provisions are in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional**; declaring that insofar as such statutes and constitutional provisions make rendition of any type of property for taxation a condition to the right to vote, that such statutes and constitutional provisions are in conflict with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and are therefore unconstitutional; declaring that insofar as the state of Texas or any subdivision thereof may attempt to require proof of ownership of property of any kind as a requirement to the right to vote, that such action is in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; declaring that insofar as the State of Texas or any subdivision thereof may attempt to require proof of rendition of property of any kind as a requirement to vote, that such action is in conflict with the Equal

Protection Clause of the Fourteenth Amendment of the Constitution of the United States and is therefore unconstitutional; and declaring that insofar as the state of Texas or any subdivision thereof may attempt in any manner to base the right to vote upon ownership of property of any kind, that such action is in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; and for such other and further relief as they may show themselves entitled." (Emphasis supplied)

On April 29, 1970, Petitioners also filed their First Supplemental Petition in their State Court case, complaining that:

"***the affidavit required by Article 5.04 of the Election Code of the Revised Civil Statutes of Texas is subject to the same constitutional infirmities as Articles 5.03 and 5.07 of the Election Code, and as Article 6, sections 3 and 3(a) of the Texas Constitution." (R., p. 43)

On June 10, 1970, the Petitioners filed their Second Supplemental Petition in their State Court case, alleging in Paragraph 4 thereof:

"That defendant City of Fort Worth has admitted in the affidavit of its City Secretary, Roy A. Bateman, that in bond elections otherwise qualified voters will be required to sign an affidavit to the effect that they have rendered for taxation taxable property in the City of Fort Worth or that they have property on the tax rolls." (R., p. 45)

Petitioners also pleaded therein that such requirement was directly in violation of the Equal Protection Clause of the Fourteenth Amendment and "that, therefore, the plaintiffs are in imminent danger of being harmed by the defendant City of Fort Worth."

These same Petitioners had also filed in their State Court case a motion for summary judgment, in which they alleged:

> "That there is no genuine issue as to any material fact and that plaintiffs are as a matter of law entitled to judgment herein for the reason **that the state constitutional and statutory provisions complained of by plaintiffs are in conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment** to the Constitution of the United States of America." (Emphasis supplied) (R. p. 46)

The City of Fort Worth also filed a motion for summary judgment, and on June 12, 1970, as stated by Petitioners, a hearing was held on such motions, and the case was submitted to the State Court for decision. (Judgment, R., p. 87; Appendix "A" hereto)

All of the evidentiary facts necessary to a decision of the case in the Federal Court on the matter of res judicata were admitted and stipulated and appear in documentary exhibits identified by stipulation and are included or referred to in the Pre-Trial Order of the Resident Judge. (R., pp. 176-209) It was stipulated that on August 10, 1970, the City Council of the City of Fort Worth adopted Ordinance No. 6346 (Defendant City Exhibit "J", R., pp. 95-114), the ordi-

nance calling the bond election held thereafter on September 8, 1970.

On August 31, 1970, Petitioners filed their Complaint in the United States District Court for the Northern District of Texas, which date of filing was prior to the rendition and signing of the Judgment of the District Court of Tarrant County, Texas, 141st Judicial District, on September 2, 1970.

On September 3, 1970, the Resident Judge held a conference with the respective attorneys for the parties (except the Attorney General of the State of Texas), after which conference Judge Brewster signed his Memorandum Order,[2] which order correctly contained certain findings, among which were the following:

> "2. Prior to the time this suit was filed, the plaintiffs hereto filed a suit in the 141st District Court of Tarrant County, Texas, Cause No. 57283-C, Kathleen Carter, et al. vs. City of Fort Worth, et al., attacking the constitutionality of the same statutes which are challenged in the present action and seeking declaratory judgment for substantially the same relief as they asked for in the present case. Judgment in that suit was entered by the District Court on September 2, 1970, adversely to the plaintiffs, and an appeal has been taken from such judgment.
>
> * * *
>
> "5. Plaintiffs have expressed that they do not desire to delay the holding of the pending election, **but merely seek to insure by the filing**

[2]See Appendix "B" hereto, p. 31, for copy of Judge Brewster's Memorandum Order dated Sept. 3, 1970.

> **of this suit their constitutional rights to meaningful(ly) participate** in the election." (Emphasis supplied) (R., pp. 11-12)

Thereafter, on September 8, 1970, the bond election was held and five out of the six Petitioners actually voted in the bond election (Stipulation (j), R., p. 202), which admitted fact persuasively and conclusively demonstrates that the manner of the holding of the election by the City of Fort Worth did not prevent, "chill" or deter anyone, including the sixth Petitioner, from voting in such election. (Defendants' Exhibits "B-1", "B-2", "B-3", "B-4", "B-5" and Affidavit of Roy A. Bateman, R., pp. 162-168) Further, under no conceivable class-action theory did Petitioners have any "class," since, as found by the Court of Appeals:

> "***It apparently never occurred to them that the vote of the non-property owners might make no difference in the outcome of the election, as turned out to be the case."

The fact that Petitioners wilfully and intentionally failed to perfect their appeal from the judgment of the State Court makes indelibly apparent their posture and attitude of turning their backs on a State Court system which failed to rule in their favor, obviously hoping for better luck elsewhere. In his letter of November 21, 1970, the same attorney of record for Petitioners in the State Court advised Resident Judge Brewster of the finality of the judgment in the State Court case and that Petitioners had elected "not to appeal their suit for declaratory judg-

ment in the State Court" but to "seek relief exclusively in the United States District Court." (R., pp. 140-141)

REASONS FOR REFUSING TO GRANT THE WRIT

The reasons for refusing to grant the writ are manifest in the opinion of the Court of Appeals and may also be summarized as follows:

1. The decision of the Court of Appeals is not in conflict with any decision of another Court of Appeals.

2. No important question of federal law exists to be settled — The law is well settled in this case by prior decisions of this Court, and more particularly *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947), and *Milne v. Deen*, 121 U.S. 525, 7 S.Ct. 1004, 30 L.Ed. 980 (1887). In *Angel v. Bullington*, this Court presented an authoritative and lucid discussion of the doctrine of res judicata and held that for res judicata to apply, it is not even necessary that the State Court has passed on the merits and embraced all ultimate substantive issues, and further that res judicata applies even where the judgment of the State Court may be erroneous. In so holding, this Court said:

> "***It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State."

3. No conflict exists between the decision of the Court of Appeals and applicable decisions of this Court relative to the policy and reluctance of Federal Courts to interfere with, stay or enjoin pending State proceedings. *Great Lakes Dredge & Dock Co. v. Huffman*, supra, and *Samuels v. Mackell*, supra.

4. The Court of Appeals has correctly applied and reaffirmed the principles announced in *Brown v. Chastain*, supra, and *Paul v. Dade County, Florida*, supra, on both of which cases this Court placed its stamp of approval by denying certiorari.

5. The decision of the Court of Appeals is consistent with prior decisions of this Court and other Courts of Appeals, and there is no departure from the accepted and usual course of judicial proceedings present. Thus, no necessity exists to call for an exercise of this Court's power of supervision.

6. The decision of the Court of Appeals in applying the doctrine of res judicata to the case at bar was particularly appropriate since the State Court case was identical to the Federal Court case; the State Court case commenced long prior to the filing of the suit in the Federal Court; both cases involved the same parties plaintiff; the City of Fort Worth is named as a defendant in both cases; both cases involved Petitioners' objection to the rendition of property for taxation as a qualification for voting in a general obligation tax bond election; plaintiffs in both suits objected to any requirement that they sign affidavits reciting ownership and rendition of property for taxation as a voting qualification; Article 6, Sections 3 and 3(a), of the Constitu-

> tion of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code are challenged in both cases on the grounds that they are in conflict with the Fourteenth Amendment as it pertains to equal protection of the law; both suits sought a declaratory judgment; the respective attorneys for the parties in both suits are the same; at the time the Federal suit was filed, the State Court case was still in the process of adjudication; in the State Court judgment rendered and signed on September 2, 1970, Petitioners gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth; and the same identical issues and matters in the process of adjudication and adjudicated in the State tribunal were attempted to be relitigated by Petitioners in the Federal Court.

Obviously, the decision of the Court of Appeals affirming the action of the Three-Judge Court in abstaining from asserting jurisdiction and that of the United States District Court in dismissing the cause for want of jurisdiction was in all things proper.

Historically this Honorable Court has not concerned itself with cases of the nature of the case at bar. In this connection in *Brown v. Chastain*, supra, by denying certiorari this Court placed its stamp of approval on a decision by the Court of Appeals for the Fifth Circuit, holding in part as follows:

> **"It is obvious from the complaint and the requested relief that the appellants are here attempting to relitigate their federal constitutional claims by obtaining a form of direct federal district court review of the state decisions,** since

independent equitable proceedings to prevent the enforcement of a judgment are considered a direct attack upon it. See Restatement, Judgments § 11, comment *a* (1942). The District Court was patently without jurisdiction to engage in such a review. As noted in Rooker v. Fidelity Trust Co., 1923, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362:

> If the constitutional questions stated in the . . . [complaint] actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. **If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding.** Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [Citations omitted] Under the legislation of Congress, no court of the United States other than this [the Supreme] Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [Citations omitted] To do so would be an exercise of the appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. * * * Id., at 415-416, 44 S.Ct. at 150.

"As stated in Pilkinton v. Pilkinton, 8 Cir. 1968, 389 F.2d 32, '[i]t is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the . . . [Florida] State Courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts.' Id. at 33. The decision of a federal constitutional

question by a state court does not warrant a mandatory injunction in the nature of mandamus nor an order striking its decision even if erroneous. 'State courts are competent to decide questions arising under the federal constitution, and **federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.'** " (Emphasis supplied)

To the same effect was the decision of the Court of Appeals for the Fifth Circuit in *Paul v. Dade County, Florida*, supra (cert. den.), wherein it was held:

"The record in the state case reveals that Nishan Paul, individually, sued Dade County, acting through its named Board of County Commissioners. In the instant case, Irma Feder joined Paul as a plaintiff and they named Dade County, acting through its named Board of County Commissioners, and the County Manager as defendants. Neither the addition of Irma Feder as a plaintiff nor that of the County Manager as a defendant can confer jurisdiction if it would otherwise be lacking. *See* Rooker v. Fidelity Trust Company, 1923, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362, *cf.* Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F.2d 298, cert. denied, 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747.

* * *

"It is thus clear that the constitutional issues sought to be raised here were raised and determined in the prior state action. Accordingly, the District Court lacks jurisdiction to reconsider them under our holding in Brown v. Chastain, supra." (Emphasis supplied)

The fact that judgment was rendered and signed in the State Court after Petitioners' complaint was filed herein does not inhibit the application of res judicata based on the State Court judgment. As admitted by Petitioners, the State Court judgment did not become final until October 2, 1970 under Rule 329b of the Texas Rules of Civil Procedure.

The record in this case conclusively demonstrates that for all substantive purposes the suit instituted by the Petitioners in the United States District Court is identical to their suit in the State Court, wherein judgment adverse to them on the same identical issues was rendered and from which they abandoned pursuit of the appellate process in the State Court of Civil Appeals.

Further, it is abundantly clear that no substantial federal question is presented by Petitioners herein. The record affirmatively demonstrates that Petitioners were not denied the right to vote or to participate in the bond election.

The record also shows that Petitioners failed to establish that any class existed and failed to establish that their suit met the jurisdictional prerequisites of Rule 23 of the Federal Rules of Civil Procedure, requiring that the class Petitioners purport to represent be so numerous that joinder of all of the members would be impracticable; that there be questions of law or fact common to the class; that the claims or defenses of the representative parties be typical of the claims or defenses of the class; and, lastly, Petitioners failed to establish that the representative parties will

fairly and adequately protect the interests of any class. It is abundantly clear from the record that no class existed. Five of the six Petitioners voted in the election, and their votes were tabulated and counted. The members of the class must be identifiable, and their identity cannot depend upon a state of mind. *Chaffee v. Johnson*, 229 F.Supp. 445 (S.D.Miss., 1964), affd., 352 F.2d 514 (5th Cir., 1965), cert. den., 384 U.S. 956.

None of Petitioners were immediately harmed or immediately threatened with harm. It is axiomatic that the Petitioners must be a part of the class they purport to represent. *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969).

It is idle for Petitioners to suggest that the decision of the Court of Appeals conflicts with prior decisions of this Court. It would be difficult, if not impossible, to find a more appropriate set of facts and circumstances to which to apply the doctrine of res judicata than the precise facts and circumstances in the case at bar.

Petitioners have attempted to mislead this Court by their assertions that the 141st Judicial District Court of Tarrant County, Texas, lacked jurisdiction to entertain Petitioners' State Court suit for declaratory judgment. Even a cursory examination of the authorities cited by Petitioners reveals that they do not afford any support for Petitioners' position.

As this Court well knows, it is the express purpose of the Uniform Declaratory Judgments Act (adopted in Texas as Article 2524-1, Vernon's Texas Civil

Statutes) to permit any person whose rights may be affected by a statute or municipal ordinance to file suit in the State Court to determine any question of construction or validity arising under such statute or municipal ordinance. As held in *McCart v. Cain*, 416 S.W.2d 463 (Tex.Civ.App., 1967, n.r.e.):

> "The Declaratory Judgments Act provides a method whereby parties may bring actions to determine their relative rights without waiting until they have suffered irreparable damage. To this end the Act provides for broad powers of construction in the Courts. Article 2524-1, Section 2, V.A.T.S., supra."

Petitioners brought their State Court suit pursuant to Article 2524-1, Vernon's Texas Civil Statutes, and the State Court correctly exercised its jurisdiction in rendering judgment adversely to Petitioners, from which judgment Petitioners voluntarily abandoned their appeal. None of the authorities cited by Petitioners supports a contrary view.

This Court will recall its admonitions contained in its well-considered action on February 23, 1971, when it decided *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701; *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669; *Samuels v. Mackell*, supra; *Dyson v. Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781; *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792; and *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696. On that day this Court affirmatively held that national policy forbids Federal Court intervention by injunction or declaratory judgment in cases initiated in

State Courts and pending at the time the federal suit is brought.

Resting solely on comity and the absence of factors necessary under equitable principles to justify federal intervention, and without considering whether 28 U.S.C., § 2283, which prohibits an injunction against State Court proceedings "except as expressly authorized by Act of Congress," would, in and of itself, be controlling, this Court, on February 23, 1971, re-affirmed the long-standing "abstention doctrine" and rejected lower Federal Court intervention in State prosecutions in the six cases decided. This Court in each case reversed or vacated each lower Federal Court determination as to the unconstitutionality or constitutionality, respectively, of the State statutes or ordinances challenged. Among those cases was *Perez v. Ledesma*, supra, and although each of such cases involved criminal prosecutions in which personal liberty may or may not have been curtailed, the philosophical judicial admonitions therein expressed are even more applicable to frivolous civil actions such as the case at bar. In this connection, in *Perez*, supra, this Court held in part as follows:

> "After crippling Louisiana's ability to enforce its criminal statute against Ledesma, the three-judge court expressed the view that the Parish of St. Bernard Ordinance 21-60 was invalid. Although the court below recognized that 'it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance,' the court nevertheless seized the 'opportunity to express its views of the constitutionality of the

ordinance.' 304 F.Supp. 662, 670 n. 31 (1969). Judge Boyle, the district judge who initially referred the action to the three-judge court, adopted that court's view and declared the parish ordinance invalid. There is considerable question concerning the propriety of issuing a declaratory judgment against a criminal law in the circumstances of this case.

* * *

"We are, however, unable to review the decision concerning the local ordinance because **this Court has no jurisdiction to review on direct appeal the validity of a declaratory judgment against a local ordinance,** such as St. Bernard Parish Ordinance 21-60. Even if an order granting a declaratory judgment against the ordinance had been entered by the three-judge court below (which it was not), that court would have been acting in the capacity of a single-judge court. We held in Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967), that a three-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U.S.C. § 1253 we have jurisdiction to consider on direct appeal only those civil actions 'required to be heard and determined' by a three-judge court. **Since the constitutionality of this parish ordinance was not 'required to be heard and determined' by a three-judge panel, there is no jurisdiction in this Court to review that question.**

"**The fact that a three-judge court was properly convened in this case** to consider the injunctive relief requested against the enforcement of the state statute, **does not give this Court juris-**

diction on direct appeal over other controversies where there is no independent jurisdictional base. Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them. See Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939)." (Emphasis supplied)

The greatest concern of Respondents in the case at bar is that the Petition for Writ of Certiorari be denied in the most rapid and expeditious manner. As a direct and proximate result of Petitioners' academic exercise in the maintenance of this litigation, the City of Fort Worth has been unable to issue and market $33,350,000 worth of general obligation bonds and employ the proceeds therefrom for the construction of vitally necessary public improvements, such as streets, storm drains, fire stations, and the enlargement of its sanitary sewage treatment plant. By reason thereof, Respondent City of Fort Worth has had to lay off, discharge, and contribute to the ranks of the unemployed approximately 75 personnel from its Engineering Department, unfortunately most of whom were heads of families.

An examination of the uncontroverted record herein conclusively demonstrates that by any mathematical computation known to man, the three bond propositions were adopted by a majority vote of both rendering property owners and non-rendering prop-

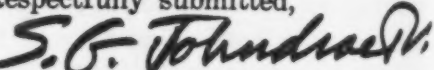
erty owners. No member of the entire electorate was prohibited from voting.

This Honorable Court would perform a wholesome and salutary function and serve the ends of justice by denying the Petition for Writ of Certiorari so that the City of Fort Worth can proceed with the vitally necessary public works of relieving an overloaded sewage treatment plant, constructing and repairing storm drains and streets, and improving fire protection.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals as set forth at pages 25-34 of the Petition for Writ of Certiorari and the Memorandum on Motions to Dismiss as set forth on pages 20-24 of the Petition are in all respects correct, and for the foregoing reasons the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,



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City Attorney
Attorney for Respondents,
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1000 Throckmorton Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for Petitioners in accordance with Paragraph 1 of Rule 33 by depositing the same in a United States Post Office, postage prepaid, addressed to Don Gladden, 702 Burk Burnett Building, Fort Worth, Texas 76102, counsel for Petitioners.

APPENDIX "A"

IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
141ST JUDICIAL DISTRICT

NO. 57283-C

KATHLEEN CARTER ET AL.

VS.

FORT WORTH INDEPENDENT SCHOOL DISTRICT AND THE CITY OF FORT WORTH

JUDGMENT

BE IT REMEMBERED that on the 12th day of June, 1970, duly and regularly came on to be considered the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter et al., and the Motion for Summary Judgment of the Defendants, the City of Fort Worth and the Fort Worth Independent School District, in the above numbered and entitled cause; and it appearing to the Court that the respective motions have been made in proper form and manner and in proper time, that proper service thereof has been had and that the plaintiffs and movants, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong, and the defendants and movants, City of Fort Worth and the Fort Worth Independent School District, are properly before this Court for a hearing on

their respective motions for summary judgment; and the Court, having considered the pleadings, the affidavits, admissions, motions, exhibits and depositions, as well as all instruments of record filed herein by both plaintiffs and defendants, and after having been fully advised in the premises, is of the opinion and finds that the pleadings, the affidavits, admissions, motions, exhibits, depositions and instruments of record on file herein conclusively demonstrate that there is no genuine issue as to any material fact and that the defendants and movants, the City of Fort Worth and the Fort Worth Independent School District, are entitled to judgment as a matter of law and that the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong, should be and the same is hereby overruled.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED AND DECREED that plaintiffs take nothing by their suit, that same be dismissed and held for naught, and that the defendants, the City of Fort Worth and the Fort Worth Independent School District, recover their costs against plaintiffs, for which let execution issue.

To all of which action on the part of the Court the plaintiffs then and there, in open court, duly excepted and objected and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.

RENDERED AND SIGNED this the 2nd day of September, 1970.

/s/ JAMES E. WRIGHT
Judge

APPROVED AS TO FORM:

/s/ DON GLADDEN
Don Gladden
Attorney for Plaintiffs
702 Burk Burnett Building
Fort Worth, Texas 76102

/s/ CECIL A. MORGAN
Cecil A. Morgan
Attorney for Defendant,
Fort Worth Independent
School District
2108 Continental Life Bldg.
Fort Worth, Texas 76102

/s/ S. G. JOHNDROE, JR.
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1000 Throckmorton Street
Fort Worth, Texas 76102

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1541

KATHLEEN CARTER, ET AL
VS.
CITY OF FORT WORTH, ET AL

MEMORANDUM ORDER

At a conference held between the respective attorneys for the parties hereto, except the Attorney General of the State of Texas, who has not made his appearance, on the morning of September 3, 1970, all parties recognized the following:

1. The ordinance setting the bond election for September 8, 1970, was adopted on August 10, 1970.

2. Prior to the time this suit was filed, the plaintiffs hereto filed a suit in the 141st District Court of Tarrant County, Texas, Cause No. 57283-C, Kathleen Carter, et al. vs. City of Fort Worth, et al, attacking the constitutionality of the same statutes which are challenged in the present action and seeking declaratory judgment for substantially the same relief as they asked for in the present case. Judgment in that suit was entered by the District Court on September 2, 1970, adversely to the plaintiffs, and an appeal has been taken from such judgment.

3. This suit was filed about 5:00 P. M. on August 31, 1970. It came to the attention of this Court on September 1, 1970, at a time when the Court was involved in the preparation of an opinion that he felt should be completed that day. On September 2, 1970, the Court sought to have a conference with counsel in this case, and the City Attorney was tied up in the trial of other litigation. The conference on this morning was the earliest that could have been had.

4. It is impractical and impossible to assemble a three-judge court and hold a meaningful hearing before the present bond election scheduled on September 8, 1970, as the Attorney General was entitled to five days notice and he has not yet made his appearance herein.

5. Plaintiffs have expressed that they do not desire to delay the holding of the pending election, but merely seek to insure by the filing of this suit their constitutional rights to meaningful(ly) participate in the election. They recognize the problem created by the time they filed their application for injunction in the federal court but insist that they are entitled to pursue the relief sought in their petition, insofar as they are entitled to injunctive relief from a three-judge court disposing of those matters which will not become moot as a result of the election procedure to be followed before the court could be assembled. The plaintiffs do not insist on any injunction which would prevent the holding of the bond election that is presently set for September 8, 1970.

6. The defendants, City of Fort Worth, Bateman

and Stovall, have filed a motion to dismiss and in opposition to the appointment of a three-judge court. Action on that motion will be held in abeyance until it is determined whether a three-judge court should be convened and, if so, whether such court should pass on the motion.

It is accordingly ordered that the bond election proceed as scheduled on September 8, 1970, and that this Court submit to the Chief Judge of the Fifth Circuit the request for the appointment and convening of a three-judge court, and that this case proceed in accordance with the directions of the Chief Judge when he has an opportunity to consider the request for a three-judge court.

Signed, September 3, 1970.

/s/ LEO BREWSTER
JUDGE

E COPY (D)

FILED
AUG 29 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners,*

vs.

CITY OF FORT WORTH ET AL., *Respondents.*

Supplemental Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, In Opposition to Petition for Writ of Certiorari

---

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Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners,*

vs.

CITY OF FORT WORTH ET AL., *Respondents.*

Supplemental Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, In Opposition to Petition for Writ of Certiorari

Now come Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, and in compliance with Rule 24 of the Rules of this Court file this, their Supplemental Brief, and for same would show the Court the following:

These Respondents would call to the attention of the Court an additional **Reason for Refusing to Grant the Writ:**

The United States District Judge, the Three-Judge Court and the Court of Appeals all properly refused to pass upon the constitutionality of Sections 3 and 3a, Article 6 of the Texas Constitution and Articles 5.03, 5.04 and 5.07 of the Texas Election Code since the State Court Judgment (Appendix "A", pp. 28-30, Original Brief of Respondents in Opposition to Peti-

tion for Writ of Certiorari) was res judicata, and jurisdiction clearly did not obtain.

In this connection, the Court of Appeals correctly held as follows:

> "The sole issue presently before us is: Whether the Three Judge Court or the District Court sitting as a single judge had jurisdiction of the case. We do not consider the merits.
>
> "Our prior decisions in Brown v. Chastain, *supra*, and Paul v. Dade County, *supra*, are plainly controlling here, as decided by the courts below. **The parties were the same, the issues were the same.** The plaintiffs lost what they allowed to become a final judgment in the state court and started over again in the federal courts. That is the point to be emphasized here. **The present parties are through. That does not foreclose the right of others to file an appropriate action in the federal system if the occasion should arise.**" Carter v. City of Fort Worth, 456 F.2d 572, 576 (1972) [Emphasis supplied]

The "**occasion**" referred to in the Court of Appeals opinion arose on April 11, 1972, on which date the City of Fort Worth conducted another municipal election at which two propositions were submitted to the electorate—one to determine whether or not the City Council of the City of Fort Worth should be authorized to issue tax-supported general obligation bonds for public transportation purposes and the other to determine whether or not general obligation bonds should be issued for the purpose of improving and equipping its library system and building a new library.

The "dual election" was held on said date in compliance with policies and instructions of the Attorney General of the State of Texas and further in compliance with Sections 3 and 3a of Article 6 of the Constitution of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code. The result of such election was that a majority of both the rendering property-owning voters, as well as the non-rendering property-owning voters, approved the issuance of the tax supported bonds for public transportation, but with respect to the library bond proposition, a majority of the voters who had property rendered for taxation voted against the issuance of the library bonds and a majority of the non-rendering voters voted in favor of the library bonds. The tabulation and result of the voting on the library bond proposition was as follows:

	Owners of Property Rendered for Taxation	*Non-Renderers*	*Total*
FOR	10,849	3,758	14,607
AGAINST	12,234	1,132	13,3[illegible]

On April 17, 1972, the same attorneys of record for Petitioners herein filed a class action complaint in the United States District Court for the Northern District of Texas, designated CA-4-1975, styled Michael L. Stone et al., Plaintiffs, vs. R. M. Stovall et al., Defendants, such suit being filed on behalf of parties other than Petitioners herein, but otherwise their suit is essentially a carbon copy of Petitioners' complaint in the case at bar, though wholly free from the taint of res judicata. Thereafter, Plaintiffs, Michael L. Stone et al., filed Plaintiffs' Second Amended

Complaint, both of which complaints sought the appointment of a three-judge court and a declaratory judgment and further sought

> "***to enjoin the enforcement of Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code and a portion of Section 19 of Chapter 25 of the Fort Worth City Charter, all of which provisions purport to limit the right to vote in bond elections to persons who own property which has been rendered for taxation."[1]

The relief prayed for by Plaintiffs in their First Amended Complaint filed April 28, 1972, in CA-4-1975, now pending in the United States District Court for the Northern District of Texas, is as follows:

> "PRAYER
>
> "WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request this Court to grant them the following relief:
>
> "1. The plaintiffs respectfully request the Court to declare Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City Charter of the City of Fort Worth which provides 'Provided, that no bonds shall be issued, or bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are

[1]See Appendix "C" hereto, post, p. A-1, for copy of Plaintiffs' First Amended Complaint (exhibits omitted), filed April 28, 1972, in Civil Action No. CA-4-1975, in the United States District Court for the Northern District of Texas.

in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued.' to be in irreconcilable conflict with the Fourteenth Amendment to the United States Constitution and hence unconstitutional and void.

"2. The plaintiffs respectfully request this Court to direct the defendants, S. G. Johndroe, the City Attorney, and his successors in office, the defendant City Council members and their successors in office, and the defendant City of Fort Worth to not consider the fact that a majority of property owners whose property had been rendered for tax purposes voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that they consider without differentiation, the aggregate vote cast and tabulated by all persons casting ballots.

"3. The plaintiffs respectfully request the Court to direct the Attorney General of Texas and his successors in office to not consider the fact that a majority of property owners voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that he consider, so far as the number of votes cast and tabulated, the fact that a majority of resident qualified voters of the City of Fort Worth voted for (in favor of) Proposition Number II in reaching such a decision.

"4. The plaintiffs respectfully request that this Court enjoin all of the defendants and their

successors in office from considering or giving any force or effect to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City of Fort Worth Charter set forth in number 1 above, in connection with the votes cast by the citizens of Fort Worth, Texas, in the April 11, 1972 bond election of the City of Fort Worth.

"5. The plaintiffs respectfully request this Court to enjoin all of the defendants and their successors in office from giving any effect or force in the future to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the Fort Worth City Charter set forth in number 1 above including segregating ballots.

"Plaintiffs respectfully request this Court to grant judgment in their favor, respectfully request that this Court grant them costs of suit and such other and further relief as they may show themselves entitled.

/s/ Don Gladden
DON GLADDEN
/s/ Marvin Collins
MARVIN COLLINS

GREATER FORT WORTH
CHAPTER OF THE
AMERICAN CIVIL LIBERTIES
UNION

702 Burk Burnett Building
Fort Worth, Texas 76102

ATTORNEYS FOR
PLAINTIFFS"

On May 8, 1972, the City of Fort Worth; S. G. Johndroe, Jr., City Attorney; R. M. Stovall, Mayor; Roy A. Bateman, City Secretary; and the members of the City Council of the City of Fort Worth, all Defendants in Civil Action No. CA-4-1975, filed their Original Answer,[2] and on May 9, 1972, Defendant Crawford Martin, Attorney General of the State of Texas, filed his Original Answer.

On May 10, 1972, in response to the request of the Honorable Leo Brewster, the United States District Judge for the Northern District of Texas, Fort Worth Division, the designation and composition of the Three-Judge Court requested by Plaintiffs was ordered by the Honorable John R. Brown, Chief Judge of the Fifth Circuit. Judge Brown designated Circuit Judge, Honorable Homer Thornberry, and District Judge, Honorable Halbert O. Woodward, to serve with the Requesting Judge, Honorable Leo Brewster, as members of, and with him to constitute the Three-Judge Court to hear and determine Civil Action No. CA-4-1975.[3]

Clearly and positively Petitioners' concern, as reflected on page 16 of the Petition for a Writ of Certiorari, that "the ultimate constitutional issue presented by this case is of great significance" is totally

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[2]See Appendix "D" hereto, post, p. A-18, for copy of Original Answer of Defendants, R. M. Stovall, Mayor, et al. (exhibits omitted), filed May 8, 1972, in Civil Action No. CA-4-1975, now pending in the United States District Court for the Northern District of Texas.

[3]See Appendix "E" hereto, post, p. A-44, for copy of Designation and Composition of the Three-Judge Court, filed May 10, 1972, in Civil Action No. CA-4-1975, now pending in the United States District Court for the Northern District of Texas.

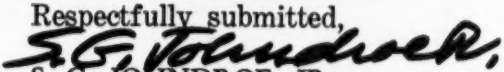
unfounded and pales into insignificance since the same attorneys of record for Petitioners have currently pending against the same Respondents herein Civil Action No. CA-4-1975, Michael L. Stone et al., Plaintiffs, vs. R. M. Stovall et al., Defendants, before a Three-Judge Court, an identical case unaffected by res judicata and in the process of being presented for determination by a three-judge court. An examination of Plaintiffs' First Amended Complaint therein and the Original Answer of Defendants, R. M. Stovall, Mayor, et al., reveals that all constitutional questions and issues involving Sections 3 and 3a of Article 6 of the Constitution of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code have been raised and the issues have been joined as to whether or not such Texas election provisions are valid with respect to who may vote in elections for the purpose of determining whether or not tax-supported general obligation bonds may be issued.

Respondents submit that Petitioners' harassing and vexatious litigation will be ended, that a multiplicity of suits will be avoided, and that the efficient administration of justice will be served by denying the Petition for a Writ of Certiorari so that the City of Fort Worth may proceed with the sale and issuance of the $33,350,000 worth of general obligation bonds authorized by a majority of the electorate on September 8, 1970, for the construction of vitally necessary public works.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals was in all things correct, and for the foregoing additional reason the Petition for a Writ of Certiorari filed herein should be denied.

Respectfully submitted,



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ET AL.
1000 Throckmorton Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

A copy of this Supplemental Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for Petitioners in accordance with Paragraph 1 of Rule 33 by depositing the same in a United States Post Office, first class, postage prepaid, addressed to Don Gladden, 702 Burk Burnett Building, Fort Worth, Texas 76102, counsel of record for Petitioners.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-4-1975

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PLAINTIFFS

vs.

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Fort Worth, Texas

DEFENDANTS

PLAINTIFFS' FIRST AMENDED COMPLAINT

1

On April 11, 1972, the City of Fort Worth held a bond election in which the plaintiffs voted. Their votes were not, and will not be, given equal weight with the votes of certain other persons who voted in that election.

2

The plaintiffs bring this suit to vindicate their right to have their vote in bond elections counted equally with the votes of all other people in such elections, and to enjoin the enforcement of Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code and a

portion of Section 19 of Chapter 25 of the Fort Worth City Charter, all of which provisions purport to limit the right to vote in bond elections to persons who own property which has been rendered for taxation.

3

Jurisdiction is conferred on this court by 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3).

4

This case is brought pursuant to: 28 U.S.C. §§ 2201 and 2202 for a declaratory judgment; 28 U.S.C. §§ 2281 and 2284, requiring the convening of a three-judge court; and Rule 23 (a) (b) of the Federal Rules of Civil Procedure providing for a class action in certain cases.

5

This action is brought by the plaintiffs against the City of Fort Worth, Crawford Martin, Attorney General of Texas, S. G. Johndroe, City Attorney for the City of Fort Worth, R. M. Stovall, Mayor of the City of Fort Worth, Roy A. Bateman, City Attorney for the City of Fort Worth, and all members of the City Council of the City of Fort Worth.

CLASS ACTION

The plaintiffs are members of a class of natural persons in the City of Fort Worth who voted in the City of Fort Worth bond election of April 11, 1972, against whom the defendant, City of Fort Worth and defendants city officials of the City of Fort Worth have unconstitutionally discriminated, against whom the

defendant City of Fort Worth and the defendants city officials of the City of Fort Worth have threatened to, and are about to, unconstitutionally discriminate, and against whom the defendant Attorney General has threatened to, and is about to, unconstitionally discriminate. The unconstitutional discrimination just complained of consists of the enforcement of the provisions of the Constitution and Statutes of the State of Texas, and a portion of the Fort Worth City Charter, all of which require ownership of property which has been rendered for taxation as a prerequisite to the right of qualified voters to vote in non-federal bond elections, as hereinafter more fully appears. This class of Fort Worth citizens is so numerous that it is impractical to join all of them in one action. There are questions of law common to all of the members of the class, to-wit: the application of Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and a portion of Chapter 25, § 19 of the Fort Worth City Charter, and the application of a system of dual balloting originally conceived by the Attorney General of the State of Texas, and applied in the Fort Worth city bond election held on April 11, 1972. There are questions of fact common to all members of the class, since the discrimination of which plaintiffs complain took place during or arises or will arise out of, the Fort Worth city bond election held on April 11, 1972. The claims of the parties plaintiff to this action are typical of the claims of the class in that the members of the class are seeking to have their votes counted equally with the votes of other, more privileged voters who were

permitted to vote in the Fort Worth city bond election of April 11, 1972. The parties plaintiff in this action will fairly and adequately protect the interests of the class as a whole. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class not parties to this adjudication. The defendants have acted, refused to act, threatened to act, threatened to refuse to act, and are about to act and about to refuse to act, on grounds generally applicable to the plaintiffs' class, to-wit: the defendants have refused, threatened to refuse, and are about to refuse to sell, certify, approve, or otherwise ratify Proposition Number II which was submitted to the qualified voters of the City of Fort Worth in a bond election held on April 11, 1972, in which a majority of the qualified voters of the City of Fort Worth voted for Proposition Number II. The defendants have refused, threatened to refuse, and are about to refuse to so sell, certify, and approve and otherwise ratify these bonds for the reason that a majority of the persons who voted in that election as property owners voted against Proposition Number II, such refusal and threatened refusal being made by the defendants on the basis that Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and a portion of Chapter 25 § 19 of the Fort Worth City Charter, require a majority of persons voting as property owners to vote in favor of the proposition, as a prerequisite to

such selling or approval, or both such selling and approval. Furthermore, the questions of law and fact common to the members of the class dominate over any other questions which affect only individual members.

7

PLAINTIFFS

All of the plaintiffs voted in the Fort Worth city bond election held on April 11, 1972, all of the plaintiffs cast ballots on both of the propositions submitted, and all of the plaintiffs voted for (in favor of) Proposition Number II. True and correct copies of affidavits executed by each of the plaintiffs in which each plaintiff swears that he voted and how he voted, are attached to this petition as Exhibit A, and they are hereby incorporated by reference in this petition as though fully and correctly set out herein. A true and correct copy of the voter lists or poll lists for the April 11, 1972 City of Fort Worth Bond Election which contain the names of the plaintiffs are attached to this petition as Exhibit B, which exhibit is hereby incorporated by reference in this petition as though fully and correctly set out herein.

8

Plaintiffs Michael L. Stone, Dorothy I. Ellis, and James D. Henderson voted as qualified voters of the City of Fort Worth and not as rendering property owners. They voted for (in favor of) Proposition Number II.

A true and correct copy of the affidavits signed by

those plaintiffs, at the polling places on April 11, 1972 (except that signed by Plaintiff Henderson) is attached to this petition as Exhibit C and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

9

Plaintiffs Pat Crowley and Marjorie M. Watson voted in the Fort Worth City Bond Election on April 11, 1972, as rendering property owners. They voted for (in favor of) Proposition Number II.

A true and correct copy of the affidavits signed by those plaintiffs at the polling places on April 11, 1972 is attached to this petition as Exhibit D and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

10

Plaintiffs are all natural persons who on and prior to April 11, 1972, and who are presently:

1. not subject to any of the voter disqualifications set forth in Article 6 § 1 of the Texas Constitution;
2. persons who have attained the age of 18 years;
3. citizens of the United States;
4. persons who resided in Fort Worth, Tarrant County, Texas 30 days next preceding April 11, 1972; and
5. persons who have registered annually before offering to vote at the Fort Worth City Bond Election held on April 11, 1972.

A true and correct copy of the respective voter registration certificates of each of the plaintiffs is attached to this petition as Exhibit E, and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

11

DEFENDANTS: DUTIES

Defendant Roy A. Bateman, City Secretary of the City of Fort Worth, was charged with administrative duties concerning the preparing and holding of this election by Ordinance Number 6644, and is charged therein with the administration of the election laws of the State of Texas.

12

The defendant S. G. Johndroe in his capacity as City Attorney has duties which include the preparation of all bonds in which the city is concerned, endorsing his approval on the bonds as to the form and legality thereof, and which include the power to prevent the bonds from becoming effective. This authority is conferred upon the City Attorney by Chapter 6, section 3 of the City Charter of the City of Fort Worth, a true and correct copy of which is attached to this Complaint as Exhibit F, and which is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

13

Defendants members of the City Council of the City of Fort Worth have the power to make all necessary

regulations concerning the manner of holding elections in the City of Fort Worth.

This authority is conferred upon the City Council by Chapter 28 § 29 of the Fort Worth City Charter, a true and correct copy of which is attached to this petition as Exhibit G, and which is hereby incorporated by reference in this petition as though fully and correctly set out herein.

14

Defendants members of the City Council of the City of Fort Worth have the authority to provide for the issuance and sale of bonds for legitimate purposes. This authority is conferred upon the City Council by Chapter 25, § 19 of the Fort Worth City Charter, a true and correct copy of which is attached to this Complaint as Exhibit H, and which is hereby incorporated by reference herein as though fully and correctly set out in this Complaint.

15

The defendant Attorney General of Texas has duties which include the certification of legality of proceedings underlying the issue of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

16

ELECTION

On the 13th day of March, 1972, the City of Fort Worth adopted Ordinance Number 6644 which pro-

vided for a submission of two bond propositions to the voters of the City of Fort Worth, the election to be held on April 11, 1972. Proposition I provided for submission to the voters of bonds for a transit system. Proposition II provided for submission to the voters of bonds for library facilities. The election was held on April 11, 1972.

A true and correct copy of Ordinance Number 6644 is attached to this Complaint as Exhibit I and is hereby incorporated by reference herein as though fully and correctly set out in this petition.

17

On the 17th day of April, 1972 the City Council of the City of Fort Worth approved and adopted the returns of the Fort Worth City bond elections held on April 11, 1972 which reflected the following results of the election, as to Proposition Number II:

Property Owners	
For:	10,849
Against:	12,234
Non-property Owners:	
For:	3,758
Against:	1,132
Total For:	14,607
Total Against:	13,366

A true and correct copy of the minutes of the City Council of the City of Fort Worth approving and adopting the returns is attached to this Complaint as Exhibit J and is hereby incorporated by reference

in this Complaint as though fully and correctly set out herein.

18

Prior to the holding of the election of April 11, 1972, the defendant City Secretary of Fort Worth issued instructions to each of the election judges for the bond election. These instructions basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from voters who did not own taxable property rendered for taxation.

19

Defendant City of Fort Worth and Roy A. Bateman made available two separate affidavits for voters at the polling places on April 11, 1972: one such affidavit for persons owning taxable property which had been duly rendered or assessed for taxation and the other affidavit for persons who did not wish to sign an affidavit reciting ownership of taxable property which has been duly rendered or assessed for taxation.

A true and correct copy of that affidavit is attached to this Complaint as Exhibit K and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

20

The defendants members of the City Council of the City of Fort Worth would, but for the complained of Texas Constitutional and statutory provisions, attempt to issue and sell bonds approved by the voters

of the City of Fort Worth on April 11, 1972, in Proposition Number II.

On April 17, 1972, the City Council of the City of Fort Worth, Texas, while in regular session, unanimously passed a statement of intent to the effect that, but for legal entanglements involving the discrepancy between the aggregate total of votes approving Proposition Number II, and the total property owner votes disapproving such proposition, the bonds approved in Proposition Number II would be sold, and certification from the Attorney General of Texas would be sought. A true and correct copy of the Minutes of the City Council adopting that statement of intent is attached to this Complaint as Exhibit L and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

21

On July 10, 1969, December 19, 1969, and July 10, 1970, the Attorney General of Texas issued statements concerning the policy of the office of the Attorney General with respect to bond issues approved by qualified voters in elections limiting the franchise to rendering property taxpayers. In those statements, he made it abundantly clear that he would not approve any bond issues in which a majority of rendering property tax-payers had voted against the issue.

A true and correct copy of those statements is attached to this Complaint as Exhibit M, and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

22

Defendant S. G. Johndroe has publicly stated that the Attorney General has refused to certify bonds approved in identical circumstances and it would be pointless to submit the library bonds (that is, the bonds submitted in Proposition Number II) to the Attorney General, and has stated that it is just the same as if the issue had failed.

23

Plaintiffs Michael L. Stone, Dorothy I. Ellis, and James D. Henderson have been aggrieved and will be aggrieved by the attacked Texas provisions and Fort Worth City Charter provisions as follows:

they voted for (in favor of) Proposition Number II which was passed by a majority of qualified voters for the City of Fort Worth but which was disapproved by the persons voting as property owners. These plaintiffs, as persons who have not rendered property for taxation, have been discriminated against, since their votes were not given equal weight by the defendants compared to the votes of the property owners. They have thus been denied equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

24

Plaintiffs Pat Crowley and Marjorie M. Watson, as rendering property owners, voted for (in favor of) Proposition Number II which, though it received a majority of the votes cast in the aggregate by all of the qualified voters of the City of Fort Worth, was

defeated in the rendering property owners tabulation. As members of the general class of persons who voted for (in favor of) Proposition Number II, their votes have been denied equal weight with the votes of the rendering property owners who voted against Proposition Number II. This is so, since all rendering property owners who voted against Proposition Number II were given a veto power over all other voters voting in the April 11, 1972 election. Their constitutional rights to equal protections of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States have thus been violated.

All of the plaintiffs are unwilling to have their right to vote, or their right to have their vote counted, based upon wealth, property ownership of any kind, or rendition of property for taxation. As citizens of Fort Worth and of the United States these plaintiffs and 14,602 others like them have a right to more than a practice vote in a bond election. The children of these plaintiffs and the children of many of the other 14,602 persons similarly situated have just as much need for an adequate library as do the children of the more fortunate property owners. Unless it is right, constitutionally, for the wealthy citizens of Fort Worth to rule and the poor citizens of Fort Worth to be ruled by them, all of these plaintiffs were denied equal protection of the law.

25

Thus there is plainly no adequate administrative remedy for the plaintiffs and they therefore need not

exhaust or attempt to exhaust any further administrative remedies.

26

Furthermore, the plaintiffs have no adequate remedy at law.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request this Court to grant them the following relief:

1. The plaintiffs respectfully request the Court to declare Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City Charter of the City of Fort Worth which provides "Provided, that no bonds shall be issued, or bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued." to be in irreconcilable conflict with the Fourteenth Amendment to the United States Constitution and hence unconstitutional and void.

2. The plaintiffs respectfully request this Court to direct the defendants, S. G. Johndroe, the City Attorney, and his successors in office, the defendant City

Council members and their successors in office, and the defendant City of Fort Worth to not consider the fact that a majority of property owners whose property had been rendered for tax purposes voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that they consider without differentiation, the aggregate vote cast and tabulated by all persons casting ballots.

3. The plaintiffs respectfully request the Court to direct the Attorney General of Texas and his successors in office to not consider the fact that a majority of property owners voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that he consider, so far as the number of votes cast and tabulated, the fact that a majority of resident qualified voters of the City of Fort Worth voted for (in favor of) Proposition Number II in reaching such a decision.

4. The plaintiffs respectfully request that this Court enjoin all of the defendants and their successors in office from considering or giving any force or effect to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City of Fort Worth's Charter set forth in number 1 above, in connection with the votes cast by the citizens of Fort Worth, Texas, in the

April 11, 1972 bond election of the City of Fort Worth.

5. The plaintiffs respectfully request this Court to enjoin all the defendants and their successors in office from giving any effect or force in the future to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the Fort Worth City Charter set forth in number 1 above, including segregating ballots.

Plaintiffs respectfully request this Court to grant judgment in their favor, respectfully request that this Court grant them costs of suit and such other and further relief as they may show themselves entitled.

/s/ Don Gladden
DON GLADDEN
/s/ Marvin Collins
MARVIN COLLINS

GREATER FORT WORTH
CHAPTER OF THE
AMERICAN CIVIL LIBERTIES
UNION

702 Burk Burnett Bldg.
Fort Worth, Texas 76102
ATTORNEYS FOR
PLAINTIFFS

(Exhibits omitted)

APPENDIX "D"

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-4-1975

MICHAEL L. STONE ET AL., *Plaintiffs,*

vs.

R. M. STOVALL ET AL., *Defendants.*

Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and The City of Fort Worth, A Municipal Corporation

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TO THE HONORABLE JUDGE OF SAID COURT:

Now come R. M. Stovall, Mayor of the City of Fort Worth; S. G. Johndroe, Jr., City Attorney of the City of Fort Worth; Roy A. Bateman, City Secretary of the City of Fort Worth; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John

J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, members of the City Council of the City of Fort Worth; and the City of Fort Worth, some of the defendants in the above numbered and styled cause, and file this, their Original Answer, and for same would respectfully show the Court the following:

1.

These defendants would show that the plaintiffs have wholly failed to state a claim upon which relief can be granted and respectfully move this Court to render judgment on the pleadings and to dismiss Plaintiffs' First Amended Complaint.

2.

These defendants admit the averments contained in Paragraph 1 of Plaintiffs' First Amended Complaint to the effect that

> "On April 11, 1972, the City of Fort Worth held a bond election in which the plaintiffs voted.",

but in the absence of more information can neither admit nor deny the averments to the effect that

> "***Their votes were not, and will not be, given equal weight with the votes of certain other persons who voted in that election."

3.

These defendants can neither admit nor deny the averments contained in Paragraph 2 of Plaintiffs' First Amended Complaint wherein plaintiffs seek to

convey their personal reasons and purposes in bringing this suit.

4.

These defendants deny the conclusion contained in Paragraph 3 of Plaintiffs' First Amended Complaint to the effect that

> "Jurisdiction is conferred on this court by 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3)."

5.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 4 of Plaintiffs' First Amended Complaint to the effect that plaintiffs seek to bring their case under certain Acts of Congress and Federal Rules of Civil Procedure.

6.

These defendants admit the averments contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

7.

These defendants deny the averments contained in Paragraph 6 of Plaintiffs' First Amended Complaint to the effect that plaintiffs have been unconstitutionally discriminated against by any of these defendants or that any of these defendants have threatened to, or are about to, unconstitutionally discriminate against any of plaintiffs. Defendants would show that Plaintiffs' First Amended Complaint wholly fails to state any fact or facts showing that any class exists;

that any class is so numerous that joinder of all members is impracticable; that there are questions of law or fact common to any class; that claims or defenses of any representative parties are typical of the claims or defenses of any class; or that plaintiffs herein are representative parties who are in a position to fairly and adequately protect the interests of any purported class.

These defendants would further show that plaintiffs have failed to aver any fact or facts showing that these defendants have acted in a manner which may be injurious to any class or that a class action is superior to other available methods for the fair and efficient adjudication of any alleged controversy.

These defendants further deny the averments to the effect that these

> "****defendants have acted, refused to act, threatened to act, threatened to refuse to act, and are about to act and about to refuse to act, on grounds generally applicable to the plaintiffs' class, to-wit: the defendants have refused, threatened to refuse, and are about to refuse to sell, certify, approve, or otherwise ratify Proposition Number II which was submitted to the qualified voters of the City of Fort Worth in a bond election held on April 11, 1972, in which a majority of the qualified voters of the City of Fort Worth voted for Proposition Number II."

These defendants further deny any and all averments contained in Paragraph 6 of Plaintiffs' First Amended Complaint to the effect that they have refused, threatened to refuse, and are about to refuse

to so sell, certify and approve and otherwise ratify any bonds for the reasons stated therein.

These defendants would further show that on February 9, 1972, the City of Fort Worth did, in fact, issue $17,790,000 in General Obligation Bonds and that among the covenants and agreements made by the City of Fort Worth at the time of such sale was a covenant to the effect that no additional General Obligation Bonds would be sold within ninety (90) days from the date of such sale.

8.

These defendants admit the averments contained in Paragraph 7 of Plaintiffs' First Amended Complaint to the effect that

> "All of the plaintiffs voted in the Fort Worth city bond election held on April 11, 1972 ***.",

but are without knowledge or information sufficient to form a belief as to the truth of the averment that

> "***plaintiffs cast ballots on both of the propositions submitted, and all of the plaintiffs voted for (in favor of) Proposition Number II."

9.

These defendants admit the averments contained in Paragraph 8 of Plaintiffs' First Amended Complaint to the effect that plaintiffs, Michael L. Stone, Dorothy I. Ellis and James D. Henderson, voted as qualified voters of the City of Fort Worth and not as "rendering property owners," but are without knowledge or information sufficient to form a belief as to

the truth of the averment to the effect that

> "****They voted for (in favor of) Proposition Number II.",

since the manner in which an individual may or may not have voted is a matter of secrecy and known only to the individual voter.

10.

These defendants deny the averments contained in Paragraph 9 of Plaintiffs' First Amended Complaint to the effect that

> "****Pat Crowley *** voted in the Fort Worth City Bond Election on April 11, 1972,"

as a rendering property owner, but admit the averment to the effect that

> "****Marjorie M. Watson voted in the Fort Worth City Bond Election on April 11, 1972,"

as a rendering property owner. These defendants would show, however, that one "Crowley, George A., Mrs.," did vote in the Fort Worth City Bond Election on April 11, 1972, as a rendering property owner. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averment to the effect that

> "****They voted for (in favor of) Proposition Number II.",

since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter.

11.

These defendants admit the averments contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

12.

These defendants deny the averments contained in Paragraph 11 of Plaintiffs' First Amended Complaint to the effect that

> "Defendant Roy A. Bateman, City Secretary of the City of Fort Worth, was charged with administrative duties concerning the preparing and holding of this election by Ordinance Number 6644, and is charged therein with the administration of the election laws of the State of Texas.",

and on the contrary would show that under Article 7.13 of the Texas Election Code, it is expressly provided with respect to municipal elections that

> "***In all such elections, the mayor, the city secretary, and/or the governing body shall do and perform each act which in other elections are required to be done and performed respectively by the county judge, the county clerk and the Commissioners Court."

Further in this connection these defendants would show that under Section 11 of Ordinance No. 6644, which ordinance was adopted by the City Council of the City of Fort Worth, Texas, on the 13th day of March, 1972, and which ordinance constituted the election order for the bond election held on April 11,

1972, as well as the notice thereof, it was provided as follows:

> "That the way and manner of holding this election, the notice to be given therefor, the polling places, the personnel of the officers, precinct judges and substitutes therefor who are to hold the same, and all details connected with the holding of the election shall be determined and arranged by the City Council and administered under the direction of and by the City Secretary."

13.

These defendants admit the averments contained in Paragraph 12 of Plaintiffs' First Amended Complaint to the effect that under the provisions of Chapter VI, Section 3, of the Charter of the City of Fort Worth, the defendant City Attorney has duties which include the preparation of all contracts, bonds and other instruments in writing in which the City is concerned and that the defendant City Attorney is possessed with the authority of "endorsing his approval on the bonds as to the form and legality thereof," and that it is expressly provided in Section 3 of Chapter VI of said Charter that "no such bond, contract or instrument shall become effective without such endorsement by the City Attorney thereon."

14.

These defendants admit the averment contained in Paragraph 13 of Plaintiffs' First Amended Complaint to the effect that members of the City Council of the City of Fort Worth have the power to make all necessary regulations concerning the manner of holding

elections in the City of Fort Worth, all of which is provided for in Section 29 of Chapter XXVIII of the Charter of the City of Fort Worth.

15.

These defendants deny the averment contained in Paragraph 14 of Plaintiffs' First Amended Complaint to the effect that

> "Defendants members of the City Council of the City of Fort Worth have the authority to provide for the issuance and sale of bonds for legitimate purposes.",

since as a matter of law no individual member of the City Council has any authority whatsoever to provide for the issuance and sale of bonds for legitimate purposes. These defendants do admit, however, that the City Council of the City of Fort Worth, acting as the duly authorized governing body of the City, has the power and authority to initiate proceedings which may or may not eventually "provide for the issuance and sale of bonds for legitimate (municipal) purposes."

In this connection these defendants further aver that under the provisions of Article 709 of the Revised Civil Statutes of the State of Texas, it is expressly provided that

> "Before any bonds shall be offered for sale, *** the mayor *** shall forward the bonds to the Attorney General, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund, and a statement of the total bonded indebtedness of

> the *** city ***, including the series of bonds proposed, together with the amount of the assessed value of the *** city *** for purposes of taxation as shown by the last official assessment of such *** city ***. Such *** mayor shall also furnish the Attorney General with any additional information he may require."

Further, it is specifically provided in part in Article 709d that

> "When *** the bonds of any incorporated city *** are offered for sale, the party offering, or proposing to sell, such bonds, obligations, and pledges shall first submit them to the Attorney General, who shall carefully inspect and examine the same in connection with the law under which they were issued, and shall diligently inquire into the facts and circumstances so far as may be necessary to determine the validity thereof; and, upon being satisfied that such bonds, obligations, and pledges were issued in conformity with law, and that they are valid and binding obligations, he shall thereupon certify to their validity, and his certificate to that effect, so procured by the party offering such bonds, obligations, and pledges as the case may be, shall be submitted to the Comptroller *** with the bonds, obligations, and pledges so offered for sale, and shall be carefully preserved by the Comptroller. ***"

16.

These defendants admit the averments contained in Paragraph 15 of Plaintiffs' First Amended Complaint to the effect that the defendant Attorney General of Texas has duties which include the certifica-

tion of the legality of proceedings underlying the issuance of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

17.

These defendants admit the averments contained in Paragraphs 16 and 17 of Plaintiffs' First Amended Complaint to the effect that the City of Fort Worth held a bond election on April 11, 1972, pursuant to Ordinance No. 6644, adopted on the 13th day of March, 1972. For the benefit of the Court, these defendants would show that said ordinance provided for the submission of two propositions to the voters of the City of Fort Worth, including qualified electors who own taxable property in the City and who had duly rendered the same for taxation as well as all other resident, qualified electors of said City. Such propositions were as follows:

"I.

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Three Million Dollars ($3,000,000.00) for the legitimate municipal purpose of acquiring, equipping and improving the physical equipment and personal property of the Fort Worth Transit Company, a private corporation, and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing

interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, pavable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

"II.

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Six Million, Eight Hundred Sixty Thousand Dollars ($6,860,000.00) for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, payable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?"

Further in this connection these defendants would show that the returns of the municipal election of the City of Fort Worth held on April 11, 1972, were canvassed and approved by the City Council of said City in regular, open, public meeting on April 17, 1972, which canvass and approval reflect the following:

"Councilman Gandy made a motion, seconded by Councilman Briscoe, that the tabulation of

returns of the City of Fort Worth Bond Election held April 11, 1972, as prepared from the certified returns, submitted by the judges and clerks in each election precinct and presented by the City Secretary, be found correct, and that the votes cast on Proposition No. 1, as submitted were:

	Owners of Property Rendered for Taxation	*Non-Renderers*	*Total*
For	13,466	4,094	17,560
Against	9,834	850	10,684

and that the votes cast on Proposition No. 2, were:

For	10,849	3,758	14,607
Against	12,234	1,132	13,366

and that the tabulation of returns of said election be in all things approved and adopted. When the motion was put to a vote by the Mayor, it prevailed unanimously."

18.

These defendants admit the averments contained in Paragraph 18 of Plaintiffs' First Amended Complaint to the effect that prior to the holding of the election of April 11, 1972, the defendant City Secretary of the City of Fort Worth issued a letter of instructions to each of the election judges for the bond election. Further in this connection, these defendants would show that such instructions basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from those of qualified electors or voters who had not rendered property for taxation.

19.

These defendants admit the averments contained in Paragraph 19 of Plaintiffs' First Amended Complaint to the effect that the defendants, City of Fort Worth and Roy A. Bateman, made available two separate affidavits for voters at the polling places on April 11, 1972, one such affidavit for persons owning taxable property which had been duly rendered or assessed for taxation and the other affidavit for persons who did not wish to sign an affidavit reciting ownership of taxable property which has been duly rendered or assessed for taxation.

20.

These defendants deny the averments contained in Paragraph 20 of Plaintiffs' First Amended Complaint reading as follows:

> "The defendants members of the City Council of the City would, but for the complained of Texas Constitutional and statutory provisions, attempt to issue and sell bonds approved by the voters of the City of Fort Worth on April 11, 1972, in Proposition Number II.",

and on the contrary would show the Court that the following motion was adopted by the City Council:

> "Councilman Gandy made a motion, seconded by Councilman Briscoe, that the City Council go on record as stating that if the legal entanglements did not exist, the City would proceed to sell the library bonds voted April 11, 1972, to build a new central library, provided the other terms and conditions surrounding the sale of the

bonds and construction bid procedures were reasonable and acceptable to the City Council, and when the motion was put to a vote by the Mayor, it prevailed unanimously."

Further in this connection these defendants would show that under Section 30 of Chapter XXVIII of the Charter of the City of Fort Worth, it is expressly provided as follows:

"Every officer of the City shall, before entering upon the duties of his office, take and subscribe to an oath or affirmation, to be filed and kept in the office of the City Secretary, that he will support, protect and defend the Constitution and laws of the United States and of the State of Texas, and in all respects faithfully discharge the duties of his office or position."

21.

These defendants admit the averments contained in Paragraph 21 of Plaintiffs' First Amended Complaint to the effect that on July 10, 1969, December 19, 1969, and July 10, 1970, the Attorney General of Texas issued statements concerning the policy of the Office of the Attorney General with respect to bond issues approved by qualified voters in elections limiting the franchise to rendering property taxpayers. Further in this connection, these defendants say that such policy statements speak for themselves.

22.

These defendants deny the conclusions contained in Paragraph 22 of Plaintiffs' First Amended Complaint wherein plaintiffs aver that the defendant S. G. John-

droe "has publicly stated" certain words, but these defendants do admit that defendant S. G. Johndroe advised the City Council of the City of Fort Worth "that the Attorney General has refused to certify bonds approved in identical circumstances and it would be pointless to submit the library bonds (that is, the bonds submitted in Proposition Number II) to the Attorney General," and has generally advised the City Council of the City of Fort Worth that it is just the same as if the issue had failed.

In this connection and by way of explanation, it is admitted that the defendant S. G. Johndroe, Jr., has advised the City Council of the opinion delivered March 10, 1971, in *Montgomery Independent School District v. Crawford Martin, Attorney General of Texas*, 464 S.W.2d 638 (1971), wherein the Texas Supreme Court upheld the validity of Article 6, Section 3a, of the Texas Constitution when challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment; and the Supreme Court of Texas also found that such provision did not violate, but strengthened, the Equal Protection Clause of the Fourteenth Amendment. Further in this connection, the defendant S. G. Johndroe, Jr., informed the City Council that prior to issuing and selling any general obligation bonds, it is a matter of necessity to publish an official notice of the sale thereof, to describe and provide for terms and specifications in the sale thereof; to make provision for redemption, denomination, type of bid and interest rates, and basis of award; to provide for a good faith deposit; to provide for printing and the furnishing

of the purchaser's written opinion; to prepare no-litigation certificates; to provide for delivery; to regulate future sales; and to prepare and furnish an official bid form, and that after the taking of bids thereon, it is necessary to provide a complete transcript of the proceedings, to adopt an ordinance levying the tax to pay the interest and provide a sinking fund, to provide a statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the real, personal and mixed property in the City for purposes of taxation as shown by the last official assessment rolls, and to furnish the Attorney General with any additional information that he may require.

These defendants would further show that under their oath or affirmation filed and kept in the Office of the City Secretary, they are sworn to support, protect and defend not only the Constitution and laws of the United States, but also the Constitution and laws of the State of Texas and to faithfully discharge their duties thereunder.

23.

These defendants deny the averments contained in Paragraph 23 of Plaintiffs' First Amended Complaint to the effect that plaintiffs Stone, Ellis and Henderson "have been aggrieved and will be aggrieved by the attacked Texas provisions and Fort Worth City Charter provisions." These defendants further aver that they are without knowledge or information sufficient to form a belief as to the truth of the aver-

ments to the effect that such plaintiffs "voted for (in favor of) Proposition Number II," since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter. These defendants further deny that such plaintiffs have been discriminated against in any manner by these defendants, nor have these defendants deprived such plaintiffs of any of their rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution.

24.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 24 of Plaintiffs' First Amended Complaint to the effect that

> "Plaintiffs Pat Crowley and Marjorie M. Watson, as rendering property owners, voted for (in favor of) Proposition Number II ***.",

since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter. These defendants further deny that they have discriminated in any manner against such plaintiffs or have deprived them of any of their rights, privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States.

25.

These defendants deny the averments contained in Paragraphs 25 and 26 of Plaintiffs' First Amended Complaint.

26.

By way of further answer, if such be necessary, these defendants would show that it is a matter of compelling necessity in general obligation bond capital improvement financing that all property, real, personal or mixed, be rendered and placed on the tax rolls of the City of Fort Worth. In this connection the Court will recall that Proposition No. II hereinabove referred to in Paragraph 17 of this answer asks the voters if the City Council of the City of Fort Worth should be authorized to issue its negotiable coupon bonds in the principal sum of $6,860,000 for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system of the City of Fort Worth, and further asks the voters to authorize the "levy (of) a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof."

This Court must also keep in mind that Article 7145 of the Revised Civil Statutes of the State of Texas provides that

> "*All property, real, personal or mixed,* *** is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7145 was adopted by the Legislature pursuant to the provisions of Article 8, Section 1, of the Constitution of the State of Texas, which provides in part:

> "***All property in this State, whether owned

by natural persons or corporations, other than municipal, shall be taxed in proportion to its value***."

Article 7152 of the Revised Civil Statutes speaks to the manner in which all property shall be listed or rendered and provides as follows:

"Art. 7152. How rendered

All property shall be listed or rendered in the manner following:

(1) By the owner. Every person of full age and sound mind, being a resident of this State, shall list all of his real estate, moneys, credits, bonds or stock of joint stock or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties, and all other property.

(2) As agent. He shall also list all lands or other real estate, moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person, company, or corporation, whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

(3) Minor. The property of a minor child shall be listed by his guardian, or by the person having such property in charge.

(4) Separate property of married person. The separate property of each spouse shall be rendered by the owner thereof, but the husband or wife of the owner may act as agent of the owner in such rendition.

(5) Idiot. The property of any idiot or lunatic, by the person having charge of such property.

(6) Cestui que trust. The property of a person for whose benefit it is held in trust by the trustee of the estate; of a deceased person, by the executor or administrator.

(7) Receivers. The property of corporations whose assets are in the hands of receivers, by such receivers.

(8) Corporations. The property of a body politic or corporate, by the president or proper agent or officer thereof.

(9) Copartnership. The property of a firm or company, by a partner or agent thereof.

(10) Manufactories. The property of manufacturers and others in the hands of an agent, by such agent, in the name of his principal, as real, personal and merchandise."

Under Article 8, Section 1, of the Constitution of the State of Texas it is required that

"Taxation shall be equal and uniform."

As a matter of law, to permit a wilful non-renderer to impose a tax lien on a renderer's property without being required to assume a commensurate burden himself would be, in effect, to deprive the renderer of property without due process of law.

Further, these defendants would show that the principal of and interest on general obligation tax-supported bonds issued by the City of Fort Worth are and will be paid solely from the proceeds derived from taxes levied, assessed and collected from persons

who own real, personal or mixed property. The requirement of rendition and disclosure of property for purposes of ad valorem taxation is of the utmost importance, is a compelling necessity for an effective system of tax assessment and collection, and is inextricably related to the creation of, payment and discharge of tax bond obligations.

In this connection these defendants would show the Court that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 is $1,444,024,440. Of such assessed valuation, real property constitutes $1,077,271,500, and personal and mixed property amounts to $366,752,940.

For the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls. More than one-fourth of the total funds derived from taxation in the City of Fort Worth was derived from the taxation of personal and mixed property in said City.

For the fiscal year 1971-72, from the funds derived from such taxation, there will be required to be made for principal and interest payments on general obligation tax bonds outstanding the sum of $7,364,524, which bonds are owned and held by bona fide purchasers, for value, throughout not only the entire United States but the world.

The requirement of rendition of property, personal

and mixed, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed tangible and intangible property.

As of December 31, 1971, the outstanding unpaid general obligation tax bond indebtedness of the City of Fort Worth was $92,852,000. Attached hereto and expressly incorporated herein, marked for purposes of identification as "Defendant City Exhibit A," is a true and correct copy of a summation of the assessed values and taxes derived and to be derived from taxable property within the City of Fort Worth rendered for the year 1971. Also attached hereto and expressly incorporated herein, marked for purposes of identification as "Defendant City Exhibit B," is a true and correct copy of an instrument designated "Informal Report to City Council Members, No. 1978," dated October 1, 1971, which shows, among other things, the debt service requirements for the payment of principal and interest due and owing on outstanding general obligation bonds during the fiscal year 1971-72 in the amount of $7,364,524. This sum the City Council of the City of Fort Worth must provide to meet its outstanding general obligation bond payments during the fiscal year 1971-72. A simple mathematical computation reveals that conservatively in excess of $1,840,000 of such $7,364,524 must be obtained from taxes derived from the rendition of personal and mixed property in the City of Fort Worth.

Also attached hereto and expressly incorporated herein for all purposes incident to this proceeding, marked for purposes of identification as "Defendant City Exhibit C," is a true and correct copy of the outstanding bonded indebtedness of the City of Fort Worth as of December 31, 1971.

WHEREFORE, premises considered, these defendants pray that plaintiffs take nothing by their suit, that this Court abstain from entertaining jurisdiction herein, that same be dismissed and held for naught, and that they go hence with their costs without day, and for such other and further relief, special and general, in law and in equity, to which they may show themselves justly entitled.

/s/ S. G. Johndroe, Jr.
S. G. JOHNDROE, JR.
City Attorney
Attorney for the Defendants,
R. M. STOVALL, MAYOR; S. G. JOHNDROE, JR., CITY ATTORNEY;
ROY A. BATEMAN, CITY SECRETARY;
LEONARD E. BRISCOE, TAYLOR GANDY, JESS M. JOHNSTON, JR., W. S. KEMBLE, JR., JOHN J. O'NEILL, TED C. PETERS, PAT REECE AND MRS. MARGRET RIMMER, COUNCIL MEMBERS; AND THE CITY OF FORT WORTH, A MUNICIPAL CORPORATION
1000 Throckmorton Street
Fort Worth, Texas 76102

THE STATE OF TEXAS
COUNTY OF TARRANT

BEFORE ME, the undersigned authority, on this day personally appeared M. C. Matson, known to me to be a credible person, who, after being by me first duly sworn, on oath deposed and said:

My name is M. C. Matson. I am Director of Finance of the City of Fort Worth. I have read the above and foregoing Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a municipal corporation. I have personal knowledge of the matters of fact therein stated; same are true and correct; and I am competent to testify thereto.

/s/ M. C. Matson

SUBSCRIBED AND SWORN TO before me by the said M. C. Matson this 5th day of May, 1972, to certify which, witness my hand and seal of office.

/s/ Nancy Gateley
Notary Public in and for
Tarrant County, Texas

[S E A L]

A copy of the above and foregoing Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary;

Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a Municipal Corporation, has been furnished to plaintiffs by depositing same in the United States mail, postage prepaid, addressed to Don Gladden and Marvin Collins, 702 Burk Burnett Building, Fort Worth, Texas 76102, the attorneys of record for plaintiffs.

(Exhibits omitted)

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CIVIL NO. 4,1975

MICHAEL L. STONE, ET AL, PLAINTIFFS

VS.

THE CITY OF FORT WORTH, ET AL,

DEFENDANTS

(1) Requesting Judge: Honorable Leo Brewster
Northern District of Texas

(2) District Judge: Honorable Halbert O. Woodward
Northern District of Texas

(3) Circuit Judge: Honorable Homer Thornberry

(4) Date of Order: May 5, 1972

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied,

as to whether this is properly a case for a three-Ju
rather than a one-Judge court. This is a matter
determined by the three-Judge Court as this ena
a simultaneous appeal to the Court of Appeals and
the Supreme Court without the delay, awkwardn
and administrative insufficiency of a proceeding
way of mandamus from either the Court of Appea
the Supreme Court, or both, directed against the Chi
Judge of the Circuit, the presiding District Judge, o
both. The parties will be afforded the opportunity
brief and argue all such questions before the thre
Judge panel either preliminarily or on the trial
the merits, or otherwise, as that Court thinks a
propriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit